UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 15 Cr. 643 (PKC)

GARY HIRST,

Defendant.

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September 23, 2016
3:30 p.m.

Before:

HON. P. KEVIN CASTEL

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: BRIAN R. BLAIS
AIMEE HECTOR
REBECCA G. MERMELSTEIN
Assistant United States Attorneys

SHER TREMONTE LLP
Attorneys for Defendant
BY: MICHAEL TREMONTE
JUSTINE A. HARRIS
NOAM KORATI BIALE

ALSO PRESENT:
ELLIE SHEINWALD, Paralegal

(Trial resumed; jury not present)

THE COURT: I missed you all. Good to see you.

This is the charging conference in the United States against Gary Hirst. All counsel and the defendant are present.

You should have draft number 3, and that's what I'm going to work off of. Let me ask -- I'll turn to the government first, and then I'll turn to the defense -- any changes up to page 19?

MR. BLAIS: No, your Honor.

MS. HARRIS: Your Honor, as reflected in our letter, we had asked that the phrase "the testimony of an" --

THE COURT: No, page.

MS. HARRIS: Page 11. I apologize.

THE COURT: Thank you. Go ahead. Now continue.

MS. HARRIS: Do you mind if I sit, your Honor?

THE COURT: No, sit. It's a better idea. Thank you.

MS. HARRIS: Thank you.

"The testimony of an accomplice may be enough in itself for conviction if the jury believes the testimony establishes guilt beyond a reasonable doubt."

Typically, obviously, that's a true state of the law, but on the facts of this case, the two accomplice witnesses really testified to collateral issues. They had incriminatory information, obviously, that related to the case, but I don't think, as matter of law, that either of their testimonies would be sufficient to convict, and I think it would be misleading to instruct the jury to that effect here.

THE COURT: Let me try this. "The testimony of an accomplice may alone be enough to establish an element of a crime if the jury believes that the testimony establishes that element beyond a reasonable doubt."

Is that acceptable to the government?

MR. BLAIS: Yes, that's fine, your Honor.

THE COURT: Is that acceptable to the defense?

MS. HARRIS: If I could have a moment, your Honor.

(Pause)

MS. HARRIS: We're just trying to think briefly, your Honor, because we're not even sure -- the two accomplice witnesses in this case were Gavin Hamels, and he didn't testify about anything about Mr. Hirst whatsoever except, I guess he testified to on overt act.

MR. BLAIS: Your Honor, I guess our response to that would be, Mr. Hamels' testimony alone could establish the existence of a conspiracy even if he does not have direct testimony about Mr. Hirst. So we do think his testimony alone could establish that.

MS. HARRIS: That's fine, Judge.

THE COURT: After page 11?

MS. HARRIS: 13, your Honor. Page 13.

THE COURT: Yes. Up to 19. Up through 19. Yes. Go ahead. 13.

MS. HARRIS: Page 13, the phrase "evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence bearing of the defendant's guilt." We're just not sure here -- I guess if a defendant testifies and there's evidence of a prior inconsistent statement, that would apply here.

THE COURT: Yes. Well, let me hear from the government, because we also have a lot of emails in this case. Is this instruction appropriate on this record? It's really not impeachment of a witness with a prior inconsistent statement of a witness.

MR. BLAIS: There certainly was impeachment through prior inconsistent statements. If anything, I think this is actually a helpful instruction for the defense.

THE COURT: That's what it's intended to be.

MS. HARRIS: On further consideration, your Honor, we withdraw any objection.

THE COURT: All right. Go ahead.

MR. TREMONTE: Page 18.

THE COURT: All right.

MS. HARRIS: Page 18, I think on line 3. We thought line 3, the reference to "government" there was not necessary. I'm sorry. Mr. Tremonte?

MR. TREMONTE: Yes. It suggests that only the government introduced emails. I'm just looking for the specific reference.

THE COURT: Any objection to striking "the government", or "government's", rather?

From the government?

MR. BLAIS: No, your Honor, because the defense did use emails.

THE COURT: Great. So it's done.

MR. TREMONTE: Thank you.

THE COURT: Next. Anything through 19?

MS. HARRIS: No.

THE COURT: Okay, that's done. First 19 pages are done. What's next?

MS. HARRIS: In terms of a line issue, our next page is on page 26, your Honor, though I'm just trying to see where the -- obviously we have issues --

THE COURT: Well, that's why we're doing this page by page. You'll call it out when it comes up. Page 26 you have an issue?

MS. HARRIS: Yes. We had asked that the Court admit at the end of the page the phrase "as conclusively as with direct proof, such as evidence of an express agreement."

THE COURT: One second.

MR. BIALE: It's the last --

THE COURT: So you would put a period after the word "existed", and before the word "as", and strike everything after the word "existed", is that the thought?

MR. TREMONTE: Yes, your Honor.

THE COURT: Any objection from the government?

MR. BLAIS: We do object to that, your Honor, because the acts and conducts of other coconspirators can, in fact, warrant an inference of the existence of a conspiracy just as conclusively as with other direct proof, such as direct evidence of an express agreement. So we think this is a correct statement of the law.

THE COURT: Yes, it is a correct statement of the law. The defense doesn't dispute that. It's a correct statement of the law, correct?

MS. HARRIS: Your Honor, we are having pagination issues because one of us has a black-lined version and the other doesn't, so that's why I apologize.

THE COURT: All right. Do we have an extra copy of the clean one?

MR. TREMONTE: Your Honor, we withdraw the objection.

THE COURT: Okay, that's gone. What's next? We're kind of back to the future here using paper. Some of these younger lawyers are not as familiar how this paper stuff works.

MR. BIALE: I'm good with the paper, your Honor.

Your Honor, we're up to page 34 --

THE COURT: Hang on now.

MR. BIALE: -- of the clean version.

THE COURT: Okay.

MR. BIALE: On this page, we just think that, as your Honor has put in the third paragraph on "liability for acts and declarations of coconspirators", the charge directly says that, "the reasonable foreseeable acts or statements of any member of the conspiracy are deemed under the law to be acts or statements of all the members," and we would just ask in a few places further down that "requirement of reasonable foreseeability" be included.

So on the next page, 35, lines 2 to 3, that the sentence that ends on line 3, we would propose adding, so it would be, "have been a member of the same conspiracy may be considered against the defendant so long as those acts or statements were reasonably foreseeable to the defendant".

And then there's one additional place where we would include similar language, which I can tell you where we have it.

THE COURT: You don't have a clean version?

MS. HECTOR: We have the black-lined version.

THE COURT: I'll tell you what. We'll give you the clean version. We're going to mark draft number 3 as the next court exhibit. We'll do that on Monday. I believe it's going to be Court Exhibit 7.

MS. MERMELSTEIN: Thank you.

THE COURT: This will make it easier.

MS. MERMELSTEIN: Thank you, your Honor.

MS. HARRIS: We had both, so we were confused internally.

MR. BIALE: Your Honor, it appears you and I are the only ones who used the clean version, and your clerk.

THE COURT: To be candid with you, we had a debate about whether to send a black-lined issue, and I believe it's appropriate to let people know what changes came in and not make them hunt for it, so that's why we did it. But certainly, we're working off the clean version. You now have it.

Now we're on page 35. So the suggestion is to add at the end of the carryover sentence, the top of 35, that ends on the third line "may be considered against the defendant so long" -- go ahead.

MR. BIALE: "So long as those acts or statements were reasonably foreseeable to the defendant."

THE COURT: Any objection from the government?

MR. BLAIS: Well, Judge, just looking at their letter, I think they want to add this concept in four different places in this --

THE COURT: I'm not adding it in four places. Is that what the defense wants? Because then, really, I should on every page add every concept. "Presumption of innocence" should be on every page, "reasonable doubt" should be on every page. It's not necessary. The jury is required to follow the judge's instructions on the law.

It is my practice, just to let you know, to give the jurors the typed text of the instructions. I will tell them if there's any variance between what I say orally and the typed text, it's the oral version that controls. They'll have that with them in the jury room. If the plan here is to propose four, it's not happening.

MR. BIALE: Your Honor, I think we'd be fine just having it there in that one place I mentioned, then there's one place later on in the charge.

THE COURT: Where?

MR. BIALE: In the wire fraud instruction where we would want to have that again, because the same concept applies, and I can tell you where that is.

THE COURT: All right. Without prejudice to the government's ability to object to multiple placements, do you have any objection on the top of 35?

MR. BLAIS: If there's that one single addition in this particular instruction, no, we have no objection.

THE COURT: I'll hear you on whatever else.

MR. BLAIS: Fair enough.

THE COURT: Let's go. What next?

MR. BIALE: The second instance of that is on page 54. Sorry, one second, your Honor. So just going page by page, your Honor, there's a reference to "conscious avoidance".

THE COURT: So what are we doing? Page 54? Give me a page number.

MR. BIALE: Let's do 54, your Honor.

THE COURT: Where?

MR. BIALE: So on page 54, at line 5, so we would add after "all that is done thereafter, so long as those acts are reasonably foreseeable to the defendant". Same concept.

THE COURT: Let's give everybody a chance to read through here. I assume it would be "so long as those acts were reasonably foreseeable to the defendant", correct?

MR. BIALE: Correct.

MR. BLAIS: Your Honor, this section is drafted in a slightly different manner than the previous section. Here, the instructions are talking about a member of the scheme being legally responsible for something done in the past in furtherance of the conspiracy, as well as for things that are done thereafter, and I don't see how something in the past can be reasonably foreseeable to somebody becoming a member of the conspiracy. Obviously, foreseeability implies something happening in the future. So I think it has a potential for jury confusion.

THE COURT: I do tell the jury that, "the same instructions on conspiracy that I gave you on Count One apply to this count." Do I not? If I haven't, I should.

MR. BLAIS: I think you do, although this is actually in connection with the substantive wire fraud instruction.

THE COURT: Well, then I don't know that it has any place in there at all.

MR. BLAIS: Okay.

MR. BIALE: I think that makes sense to us, your Honor. We'll withdraw it.

THE COURT: That's fine. We're back to page 35. What do you have after 35?

MR. BIALE: We actually are still in the post page 54 world here.

THE COURT: Okay. So nothing until 54. At least 54. Is that correct?

MR. BIALE: There is a reference to conscious avoidance earlier.

THE COURT: What page?

MR. BIALE: Let me find it.

THE COURT: Court takes judicial notice that there is no control F for paper.

MR. BIALE: It's at the bottom of page 43, your Honor.

THE COURT: And this may befuddle some lawyers.

Page 43?

MR. BIALE: Yes.

THE COURT: Let's see what we have. So nothing before page 43. You're done up to this point, correct?

MR. BIALE: Yes, your Honor.

THE COURT: What's the proposed change on 43?

MR. BIALE: On 43, we don't believe that a conscious avoidance charge is appropriate.

THE COURT: All right. Let me begin by having the proponent of the charge argue why this should be, and then I'll give you a chance to argue why this shouldn't.

Go ahead.

MR. BLAIS: Thank you, your Honor.

Your Honor, I think the case law is clear that when there is a factual predicate for a conscious avoidance instruction, that a conscious avoidance instruction should be given, and I'll talk in a minute about the factual predicate here, but I did want to, just to frame that discussion, just articulate two principles of law.

The first is from United States versus Nektalov, and that's 461 F.3d 309 with a pin site 316 at 2d Cir. 2006. That case says, "Where the evidence can support both a finding of actual knowledge and a finding of conscious avoidance, the government may present conscious avoidance as an argument in the alternative. And the second principle of law is from United States versus Hopkins, which is 53 F.3d 533 with a pin site at 542, and that's Second Circuit 1995, and that case says, "Such an instruction is not inappropriate merely because the government has primarily attempted to prove that the defendant had actual knowledge while urging in the alternative that, if the defendant lacked such knowledge, it was only because he had studiously sought to avoid knowing what was claimed."

So while it may be true in this case that we are largely relying on the knowledge argument, so long as there is a factual predicate that supports a conscious avoidance instruction, the case law suggests that it is appropriate that such an instruction be given. I do think there is a factual predicate for a conscious avoidance instruction here. We set forth some of those argument in the letter brief that we filed, and I can articulate some of them here.

THE COURT: Why don't do you that.

MR. BLAIS: One is the fact that I think it's established in the evidence that the 5,333,333 shares that were issued to Mr. Shahini on May 27th, 2010 were the exact same number of shares that were sent back to the company and canceled by the company in connection with Mr. Manley's termination. That all happened within a week of each other. There's a May 26th letter from Mr. Hirst to Continental and a June 1st letter from Mr. Hirst to Continental regarding the Manley shares in which he asks that the cancellation of those shares be backdated to May 27th.

So we certainly think, given the highly, highly unlikely coincidence that the exercise of the warrant calculation, which was set forth in some complexity, that that would yield the exact same number of shares that were just turned in by Mr. Manley is certainly one fact that should put Mr. Hirst on notice that there may have been something amiss about this particular transaction.

I think number two, the fact that on at least two occasions, the chief financial officer of the company was unaware of certain transactions. In June, when he first learned of the Shahini consulting agreement, which was purportedly entered into in January, and then again in September when he indicates to Mr. Hirst that he's unaware of the existence of the warrant agreement and the issuance of the shares, those two facts, the fact that the CFO on at least two occasions is unaware of significant transactions going on at the company, again, there's an argument that Mr. Hirst should have been on notice, given the CFO's lack of knowledge about significant transactions, that something was amiss with respect to the issuance of the shares.

So I think, on multiple grounds, there's a factual predicate for a conscious avoidance instruction.

THE COURT: Let me hear from the defendant.

MS. HARRIS: Your Honor, we realize the Court may not have had a chance to read this, but just to help speed things up. For today, we had submitted a short letter and filed it on ECF at 2:00 which sets out our objections to the conscious avoidance charge, but a couple of brief responses to what the government just proffered.

We don't dispute the law that the government can argue in the alternative -- obviously they largely presented the case of direct knowledge -- but here, there still has to be a factual predicate for that alternative, it can't be just a hypothetical possibility as a backup plan.

There are two things that I heard Mr. Blais argue was a factual predicate here. One, the notion of this sort of -- the coincidence of the 5.33 somehow suggesting that something was amiss. First of all, I don't think that the notion of a generalized sort of something amiss is enough to be a substitute for the knowledge of the conspiracy alleged in the indictment. While it could be something that would be of concern, I don't think it's the kind of red flag that gives knowledge of what the government has charged as the conspiracy here.

Also, it's not even a fact, really, in itself, it's a coincidence, it's not a fact in the world that is screaming out to someone like a red -- you know, that this is a point you could say that Mr. Hirst deliberating ignored.

I forgot, the preliminary issue we wanted to raise with conscious avoidance, your Honor, is not only -- regardless of whether there was a fact in the world that they could point to as a potential red flag or putting someone on notice, there's actually no predicate here for a failure to inquire on the part of Mr. Hirst. There's no evidence, no evidence in the record of not asking questions. I mean, it's just the record is blank on that. There's nothing in the trial about a failure to inquire, to investigate, or a failure to ask questions, which I think is part of the factual predicate that needs to be established, not just the fact --

THE COURT: Well, the government's position is if he asked questions, that he had knowledge.

MS. HARRIS: Exactly. Actually, here, where everyone else --

THE COURT: But if you avoid asking the questions, then you don't obtain the knowledge.

MS. HARRIS: But your Honor, here, everyone did ask -- the government's own witnesses testified that they asked questions and didn't get the knowledge. So I don't think we can assume that -- there is no factual predicate to assume that if questions were asked, the knowledge would be given. In fact, the collective understanding of the board of directors, and everyone else, was that a certain fact -- you know, that they were informed by Jason Galanis and accepted certain answers to their questions, so there's no reason to presume that -- if we assume that he hadn't asked, that if he had asked, that he would have been given any answer that was different.

The second issue is that the June/September kind of time period that Mr. Blais talks about as providing additional red flags. Your Honor, that's after -- first of all, even to the extent those constitute red flags, that's after the central conduct of when Mr. Hirst allegedly entered this conspiracy. I mean, the allegation here is that he entered the conspiracy and did something wrong and joined up with Jason Galanis and others when he signed the warrant agreement and when he signed the letter to Continental to issue the stock. That somehow those series of transactions were complete and done as of May 27th, that's the moment he joined the conspiracy, and it's his state of mind at that time that the jury is going to have to be considering. So to then put elements or facts from the record that occurred after that date as somehow then bearing on -- that he should have -- it doesn't link up. It has no bearing on his state of mind as of the date that he allegedly joined the conspiracy.

MR. TREMONTE: May I have one moment, your Honor?

(Pause)

MR. TREMONTE: Judge, I'd be interested to hear from the government how it is that the correspondence between these two numbers is evidence that something's amiss on their theory of the case. I mean, I just don't understand that. Like why is that in and of itself an indication of anything other than a correspondence between two numbers. And as I understand their foreseeability theory, it would have been in Mr. Hirst's interest for there to have as many shares as possible in the quote/unquote public float. Why is the cancellation of the exact same numbers consistent with a theory of amiss? It doesn't make any sense.

THE COURT: Let me ask you. Is the defendant otherwise finished with their argument?

MR. TREMONTE: We're checking, your Honor.

THE COURT: All right, good.

(Pause)

MS. HARRIS: Your Honor, I mean, look. There are other factors in the record that concern the Court or the government and we'll be happy to respond to those.

MR. TREMONTE: Yes, your Honor. We're all set.

THE COURT: I've considered the issue, and I've considered the arguments of both sides. I presided at this trial, and I heard the evidence, and the evidence of defendant's knowledge is a case built largely, though not entirely, on circumstantial evidence. I look at this in a much more holistic manner, having sat here through the trial, and much of the evidence that would support a finding of actual knowledge suggests that the defendant had knowledge of facts, the same facts which would have given him an awareness of a high probability that a fact was so.

It seems to me that conscious avoidance is quite appropriate in this case as an alternate theory, and it's quite appropriate for the government to argue that there was actual knowledge. But alternatively, these facts, if they don't amount to actual knowledge, amount to conscious avoidance, and therefore, I am giving a conscious avoidance charge.

MR. BIALE: I think there's one other issue, your Honor, on page 60.

MR. BLAIS: Your Honor, just to finish the thought on conscious avoidance. I think that occurs in two places. Page 43, which we just flagged, and then separately there's a conscious avoidance instruction, which I think we need to eliminate the terms which is currently there, if applicable, which is on page 62. The top of page 62.

THE COURT: Thank you.

Go ahead.

MR. BIALE: Your Honor, on page 60, just before "willfully causing a crime".

THE COURT: Yes.

MR. BIALE: In that short paragraph, at the end of the aiding and abetting charge, we would propose replacing "if he did" with "if the government has proved beyond a reasonable doubt that he did", and then replacing in the next sentence "if he did not" with "if the government has not proved beyond a reasonable doubt that he did".

THE COURT: Any objection from the government?

MR. BLAIS: No, your Honor.

THE COURT: I just want to make sure on the second sentence I don't have a double negative. So let me read the way I propose to give it on the second sentence. This is the last sentence above "willfully causing a crime". "If the government does not prove beyond a reasonable doubt that he did, then the defendant is not an aider and abettor and is not guilty as an aider and abettor of that offense".

MR. BIALE: Sounds right. Yes, your Honor.

THE COURT: Okay.

MR. BLAIS: No objection from the government.

MR. BIALE: Those are all the changes we have, and we have two instructions that we propose adding.

THE COURT: Which are?

MR. BIALE: Which are an instruction on multiple conspiracies, and then the instruction on Regulation S.

THE COURT: All right. Let me let the government first catch up on any changes. I guess take it from page 20 on.

MR. BLAIS: We have no changes. We have reactions to the two additional instructions that are proposed.

THE COURT: I understand.

MR. BLAIS: We have no additional proposals.

THE COURT: Take a look at the defendant's proposed multiple conspiracy charge on page 2 of the letter today, and put a bracket around the first sentence, and put a bracket around the last sentence such that it would read, "Proof of several separate conspiracies is not proof of a single overall conspiracy. As I have instructed you, you must determine whether the conspiracy charged in the indictment actually existed. If you find that the government has not proven beyond a reasonable doubt that the conspiracy charged in the indictment existed, you must acquit Mr. Hirst of that conspiracy."

I'll hear from both sides why that isn't a proper charge just as I've read it. Any objection from the government?

MR. BLAIS: May we have a minute, your Honor?

THE COURT: Sure.

(Pause)

MR. BLAIS: Judge, as a general matter, I think, to the extent that the defense is going to argue the existence of multiple conspiracies, I do think they are entitled to a multiple conspiracy instruction. I think our preference would be to just use the instruction that's in Sands for multiple conspiracy, which is I think instruction 19-5.

THE COURT: What does it say?

MR. BLAIS: I don't have it at my fingertips. I think it, in essence, is very similar to the instruction that you've read.

THE COURT: Okay. So everybody put your thinking cap on. There could be a problem with what I just proposed, but tell me what it is, because I think that's a correct statement of the law.

MR. BLAIS: Agreed, your Honor. I don't think the portion that you've -- excluding the first and last sentence, I think the portions that you read are a correct statement of the law.

THE COURT: So you have no objection to that.

MR. BLAIS: We would have no objection.

THE COURT: Okay. Let me hear from the defendant.

MR. BIALE: Your Honor, I think we're fine with that, too. I think that the last sentence is from Sand, we're just checking right now.

THE COURT: It may be, but Judge Sand -- and I love him -- is not presiding in this case. And if it came from Sand and Siffert, I would respectfully say that I don't think it's as clear as it can or should be. So with all deference to Judge Sand and John Siffert -- who I also like very much -- I would not be inclined to give that.

So where do you propose for me to put this? That's a tossup question.

MR. BIALE: Your Honor, I think we propose to put it at the end of the charge on the existence of the conspiracy which starts on page 25 and ends on page 27.

MR. BLAIS: I guess our proposal would be, rather than putting it at the very end, put it as the second to last paragraph, because I think the last paragraph as it exists is basically a summary of the charge that precedes, so it seems better to end with that.

THE COURT: Where are you?

MS. MERMELSTEIN: 27, your Honor.

THE COURT: 27.

MS. MERMELSTEIN: Yes.

THE COURT: So above the paragraph beginning "so you must first".

MR. BLAIS: That would be our proposal.

THE COURT: Any objection?

MR. BIALE: No objection, your Honor.

THE COURT: Let me hear you on whether I should charge anything on Regulation S and what I should charge. Go ahead.

MR. TREMONTE: Your Honor, we didn't hear back from the government on this. We sent it sort of the middle of today, so we didn't get a chance to discuss it.

Based on my previous conversations with the government, my understanding is that we're in general agreement that a charge is appropriate. I had a conversation with Mr. Blais following a sidebar, and this really is an attempt to sort of capture the basics, plus it tracks the testimony that Mr. Laby gave, except, candidly, your Honor, I believe at the end of the final sentence, "shares issued or sold pursuant to Regulation S may be held in U.S.-based brokerage account", that is Professor Laby, and may serve as collateral for a margin load in a U.S.-based brokerage account," I don't think that's controversial, but that's not from Professor Laby.

MR. BLAIS: Judge, I think the instruction as written is not an incorrect statement of the law. I think this is what Regulation S says and provides, however, we think it's potentially confusing to give this instruction to the jury. There is testimony in the record about Regulation S and how it operates, and I think including this as a legal instruction may carry some suggestion that the jury has to determine whether Regulation S was or was not complied with in connection with this case, and that's not something that they necessarily need to find.

Now, of course, whether regulation was or was not complied with may be evidence of intent in this case or relevant in some other way, but I think just including a standalone instruction on Regulation S may cause jury confusion so I think our thought is we should leave it out.

THE COURT: I understand what you're saying, and I have some ideas on what I might do.

MR. TREMONTE: Your Honor, if I could?

THE COURT: Go ahead, Mr. Tremonte.

MR. TREMONTE: If I could make a record on that, your

Honor. The big problem here, of course, is that there was conflicting testimony from people who should have known better, and we tried to clean that up to some extent on cross, but unfortunately, at least one of the government's witnesses, if not sort of one and a half, persisted in articulating not a misunderstanding of Regulation S, but an understanding that is basically flatly contradictory to what the law states. I think that gives rise to a very serious problem in terms of jury confusion.

It also goes to both intent, as Mr. Blais appropriately noted, but also foreseeability. The jury has to understand, and I think it's fair for us to argue, your Honor, that it's not foreseeable in this context that down the line of an extended chain of causation, you've got actors -- potentially bad actors, potentially not -- who are acting contrary to the law, which by the way is appropriately and accurately memorialized in the very letter that Mr. Hirst sent and in the letter that he received from Mr. Feiner. So I think on the jury confusion point, on intent and on foreseeability it's important that the jury get an instruction.

THE COURT: One moment, please.

(Pause)

THE COURT: I'm going to propose that on page 64, after the conscious avoidance charge, that I would have a charge on Regulation S. And the lead-in would be, "During the course of this trial, evidence was offered about a regulation of the Securities and Exchange Commission known as Regulation S. I will now instruct you on the meaning of this regulation." Then following the text on page 1 of the letter of September 23, 2016 of Sher Tremonte. And then following that text, "this instruction was given because it may help in your understanding of the evidence," and leave it at that.

MR. TREMONTE: That's good with the defense, your Honor.

MR. BLAIS: Judge, we believe there needs to be some concept in there that this is not an element that they are required to find one way or the other.

THE COURT: That's why I said it the way I said it. That's why I said it that way. That it's given so you can understand the evidence. It's being separated from the charges, it's coming after the conscious avoidance and before venue.

MR. BLAIS: Right. But conscious avoidance is a way of finding an element. Venue is also something that must be found by the jury.

THE COURT: I'm openminded on this. I can put it on 66 before concluding judges.

MS. MERMELSTEIN: I think, your Honor, what we're suggesting is just one additional line that says something like, "To be clear, whether or not Regulation S was violated is not an element of any crime charged here, it's being provided to assist you in considering the evidence in this case."

MR. TREMONTE: To the point made earlier, Judge, by that reasoning, that qualifying language would make its way into any number of paragraphs. I think the proposed placement by the Court makes it clear.

THE COURT: Yes. I'm going with what I proposed as the intro and outro, but I'm going to do it on page 66.

MR. TREMONTE: Yes, your Honor.

THE COURT: Anything else from the defendants?

MR. BIALE: Nothing further, your Honor.

THE COURT: Anything else from the government?

MR. BLAIS: No, your Honor.

THE COURT: All right.

MR. BIALE: We do have one housekeeping matter that's not related to the jury charges.

THE COURT: Go ahead.

MR. BIALE: Your Honor, there were two stipulations that were read into evidence yesterday by the defense where we took out certain defendant's exhibits that either, through agreement with the government or based on your Honor's rulings, did not end up coming into evidence. We have revised those stipulations, however, the stipulations have already been offered and admitted as defendant's exhibits. So the problem that we're having now is we need to sign a new version with the government that has the revised defendant's exhibits, but it will have a different date if we execute it today. So I guess what we were actually proposing to do is backdate it to --

THE COURT: I'm going to make a suggestion. Don't put a date on it. Do you have it done already?

MR. BIALE: We have it done but not signed.

THE COURT: Okay.

MR. BIALE: Not dated.

THE COURT: Is it dated or --

MR. BIALE: It is not.

THE COURT: What you can do, if Mr. Blais has no objection, just put on the exhibit -- put after the exhibit number "R". The letter "R". Okay? I would suggest you put S slashes on the signatures lines and not complete the date.

Is that acceptable to the government?

MR. BLAIS: That's fine with us, your Honor.

THE COURT: Is that acceptable to the defendant?

MR. BIALE: Yes, your Honor. Thank you.

THE COURT: The thing you need to do is call this to my attention when my deputy is here so we can make sure that the prior version is stricken from the record. All right?

MR. BIALE: Okay.

THE COURT: And that's exhibit number?

MR. BIALE: It's Defendant's Exhibits 1300 and 1302.

THE COURT: Okay. Go ahead.

MS. MERMELSTEIN: We have a slightly similar issue.

THE COURT: No. Before that, so 1300 and 1302 are stricken from the record and 1300R and 1302R are admitted in their place instead.

(Defendant's Exhibits 1300R and 1302R received in evidence)

THE COURT: I'll tell you right now, you may as well know, and you may as well get your team working on it, that when you're dog tired after closing arguments and suffering through the jury instructions, I'm going to make you both work together on assembling the trial exhibits that go into the jury room. So have your own exhibits done ahead of time, you're going to look at each other's stacks, make sure it's accurate and complete, and then they're going to go into the jury room. And I prefer not to have any delay on that.

MR. BLAIS: We've done that already, your Honor.

THE COURT: All right.

MS. MERMELSTEIN: In fact, your Honor, it is in doing that that we discovered that we essentially have the same problem with one of our stipulations, which is 1514. It has a typographical error, so it suggests that Government's Exhibit 1033 is stipulated to and then was offered as part of the stipulation. That's one of the documents that, in fact, the parties agreed not to offer, and so we'd like to strike Government's Exhibit 1033 from the record and then substitute in the same method that the defense will do, 1514R for the current 1514.

THE COURT: Any objection?

MR. BIALE: No objection, your Honor.

THE COURT: Excellent.

(Government's Exhibit 1514R received in evidence)

MR. BLAIS: I know we had some discussion at the end of the trial day, I believe on Wednesday, regarding the timing or length of the jury addresses. I think that's a topic we'd like to revisit.

We've kind of thought about the length of time that may be necessary. We do think that this is a case -- although it's been a relatively short trial, it is a trial with some degree of complexity and certainly a lot of documents, and we actually think that fulsome jury addresses may actually help along the jury deliberations in this case and help the jury understand the evidence.

I think from our perspective, I know I said 90 minutes for my estimate of the closing. I think, to be safe, I would say two hours for --

THE COURT: I think you guys -- and I've seen this -- guys and gals -- I've seen this in trials. There's a fundamental misunderstanding of juror comprehension. And if you think that a jury is going to follow your summation for two and a half hours, or two hours, or the defense's summation for that length, it's a dubious proposition, and I would urge you to check with those who make a profession of this, jury research consultants, many of whom have Ph.D.s in the sciences, in psychology. You will have lost your audience. I could give you four hours if you want, but you're going to lose them. You will have lost them when you get up to that level.

MR. BLAIS: Judge, we, of course, are going to make every effort to streamline and be as comprehensive but as short as necessary to fully explain the evidence, we just want to ensure that we are able to fully explain the case, which, as we said, has some degree of complexity. There are a lot of moving parts to this particular scheme, and tying all of the various pieces of evidence that came in during the course of this trial, and there are many, tying them altogether I think takes some time to fully present to the jury.

THE COURT: What were you asking for in terms of a rebuttal summation?

MR. BLAIS: I think we intended to ask for two hours for the principal closing and 45 minutes for rebuttal.

THE COURT: So you want to elongate this for 45 minutes.

Mr. Tremonte what would you like?

MR. TREMONTE: I would like for there not to be a 45-minute rebuttal.

THE COURT: What else would you like?

MR. TREMONTE: Your Honor, when asked the other day, I said 90 minutes. I have been working on this and thinking about it. I tend to agree -- I'm sorry, I said two hours, your Honor. I tend to agree with the Court. I think to go one minute more than is absolutely necessary is a mistake. That said, my original request stands, but I fully intend to be better than two hours. I'd like to do better than 90 minutes because I tend to agree with the Court that we run a really high risk of losing the jury, which in this case we absolutely don't want to do.

THE COURT: Plus which, I should say for the record that the jury instructions will run for close to three hours.

MR. TREMONTE: Understood, your Honor.

THE COURT: So that's asking the jury to comprehend 745 minutes of dense material. It means the jury won't get this case. We're not sitting next Friday, we're bumping into the Jewish holidays, and I think it's a mistake.

For one thing, the record will show that, yes, this is a case that warrants -- it was an eight-day trial. It warrants more than a 45-minute overview of the evidence from each side. I fully get that. But let me see what I can come up with.

So the government will have 90 minutes on its opening assumption, the defense will have 110 minutes on its, and the government will have 30 minutes on its rebuttal.

MR. BLAIS: Understood, your Honor.

THE COURT: Anything else?

MR. BLAIS: Nothing from the government.

THE COURT: Anything else from the defendant?

MR. TREMONTE: No. Thank you, your Honor.

MS. HARRIS: Sorry. Administratively, I note we did provide your Honor with a copy of the binder. I see it right there. Thank you very much.

Then also, I just note that we will remind your deputy on Monday, because she asked me to, but as you may recall, we marked and offered one of the emails in the binder in the middle of the read. The jury's copies of the binders are not marked, so we prepared 18 copies of the replacement page, which we can just hand to the jury, to the extent they need a marked exhibit.

THE COURT: Should I be doing anything?

MS. HARRIS: No, that's fine, Judge.

THE COURT: Thank you very much.

It almost could sound sarcastic saying have a pleasant weekend, but you have families and lives as well, I expect you're going to be working hard, but I hope you also get some rest and some personal time. I know it's stressful, and I may say this again, but it's rare that I can say that it's a pleasure to have such fine lawyers on both sides before me on a case. I'm able to say that here, and I'm able to say that with honesty and sincerity.

I apologize if I'm repeating something I've said, but I have all different types of lawyers appearing in this court, and when you have good lawyers, there may be more issues that arise, but they are presented honestly and efficiently, and every judge I ever talk to agrees with the proposition they'll take tough, aggressive, good lawyers any day of the week over folks who really don't know what they're doing at times and create a lot of unnecessary work and worry for the Court.

So it's really been a delight to have all six of the presenting lawyers and their staffs. Thank you.

(Adjourned to September 26th, 2016, at 10:00 a.m.)

GOVERNMENT EXHIBITS

Exhibit No.	Received
1514R	1540

DEFENDANT EXHIBITS

Exhibit No.	Received
1300R and 1302R	1539